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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/720,798	03/09/2001	Pieter Lykle Buwalda	294-92-PCT/U	5541
23869	7590	04/07/2004	EXAMINER	
HOFFMANN & BARON, LLP			HENDRICKS, KEITH D	
6900 JERICO TURNPIKE			ART UNIT	
SYOSSET, NY 11791			PAPER NUMBER	
			1761	

DATE MAILED: 04/07/2004

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary

Application No.

09/720,798

Applicant(s)

BUWALDA ET AL.

Examiner

Keith Hendricks

Art Unit

1761

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 09 December 2003.
- 2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 43-68 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 43-47, 49-55, 57, 58, 60 and 61 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
- Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a). Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
- ☐ Certified copies of the priority documents have been received.
 - ☐ Certified copies of the priority documents have been received in Application No. _____.
 - ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- 1) ☒ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) ☐ Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)
Paper No(s)/Mail Date _____.

- 4) ☐ Interview Summary (PTO-413)
Paper No(s)/Mail Date. _____.
- 5) ☐ Notice of Informal Patent Application (PTO-152)
- 6) ☐ Other: _____.

Art Unit: 1761

DETAILED ACTION

Applicant has canceled claims 1-42. New claims 43-68 are pending.

Claim Rejections - 35 USC § 112

The following is a quotation of the second paragraph of 35 U.S.C. 112:

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

Claim 47 is rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

Claim 47 recites improper Markush-type language, due to the nesting of the phrase "one of" (closed group language), and the phrase "and/or" (open group language). Simply put, the starch stabilizing compounds cannot be selected as "one of" A, B, C "and/or" D, as the term "and" does not indicate the selection of only "one". A broad range or limitation together with a narrow range or limitation that falls within the broad range or limitation (in the same claim) is considered indefinite, since the resulting claim does not clearly set forth the metes and bounds of the patent protection desired.

Claim Rejections - 35 USC § 102

The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

Claims 43-47 and 49 are rejected under 35 U.S.C. 102(b) as being anticipated by Jeffcoat et al. (EP 0 796 868). The references and rejection are incorporated as cited in a previous Office action.

Applicant's arguments filed December 09, 2003 have been fully considered but they are not persuasive.

Art Unit: 1761

At pages 8-9 of the response, applicants state that “meat brine, as defined by the specification, is, in general, not intended for primary consumption. See page 11, lines 14-16. Rather, meat brine is, in general, used to improve the texture of a meat product.. See page 11, lines 17-18. Chicken broth on the other hand, is intended for primary consumption and is not used to improve the texture of meat.” This is not deemed persuasive for the reasons of record. It is noted that applicant’s specification, also at page 11, states that meat brine “is a foodstuff in itself.” Applicant’s attempt to distinguish the prior art composition from the claimed composition, based upon a proposed intended use of the composition, is not deemed persuasive. Initially, the claims do not actually recite an intended use of the composition. Even so, a recitation of the intended use of the claimed invention must result in a structural difference between the claimed invention and the prior art in order to patentably distinguish the claimed invention from the prior art. If the prior art structure is capable of performing the intended use, then it meets the claim. See *In re Casey*, 152 USPQ 235 (CCPA 1967) and *In re Otto*, 136 USPQ 458, 459 (CCPA 1963). As chicken broth is capable of performing applicant’s purported intended use as a brine, then it meets the claims, and the instant invention is anticipated by the reference. Further, contrary to applicant’s assertion, chicken broth is not “intended for primary consumption”, in that instead, it is used as a component for addition to other foodstuffs.

Claim Rejections - 35 USC § 103

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Claims 43-47 and 49-50 are rejected under 35 U.S.C. 103(a) as being unpatentable over Todd Jr., in view of Jeffcoat et al.

Todd Jr. disclose a foodstuff complex comprising curcumin, a yellow pigment, and a substrate which is a polysaccharide or protein. The substrate may be milk protein, sodium caseinate, modified food starch, or other food ingredients (see summary, col. 4). This provides a stable complex which may be used in a variety of foodstuffs. At column 7, the reference discloses a pickle brine which comprises water, vinegar, salt and the coloring complex.

Art Unit: 1761

Jeffcoat et al. is taken as cited in a previous Office action.

Thus, it would have been obvious to one of ordinary skill in the art to have produced a salt brine comprising a modified food starch. As Todd Jr. does not provide specific details regarding the selection of a modified food starch, one of ordinary skill in the art would have been amply motivated to look to the state of the art for common existing modified starches, such as those disclosed by Jeffcoat et al. The simple addition of a color complex containing a known modified waxy potato starch, such as that disclosed by Jeffcoat et al., to the disclosed brine of Todd Jr., would have been well within the ordinary level of skill to have performed.

Claims 43-47, 49-55, 57-58 and 60-61 are rejected under 35 U.S.C. 103(a) as being unpatentable over Wu et al. (US PAT 5,028,445), in view of Jeffcoat et al.

Wu et al. disclose a "process of forming simulated crustacean meat," wherein pieces of surimi paste (pulverized, cleaned and rinsed fishmeat) are mixed with "salt (NaCl), a somewhat larger amount of starch and/or modified starch (wheat, corn, or potato starch, for example), a small amount of protein such as... whey protein... and water". See the middle of column 2.

Jeffcoat et al. is taken as cited in a previous Office action.

Thus, it would have been obvious to one of ordinary skill in the art to have produced a meat product containing a salt brine comprising a modified food starch. As Wu et al. does not provide specific details regarding the selection of a modified food starch, one of ordinary skill in the art would have been amply motivated to look to the state of the art for common existing modified starches, such as those disclosed by Jeffcoat et al. The simple use of a known modified waxy potato starch, such as that disclosed by Jeffcoat et al., within the disclosed combination of fishmeat, salt, water and modified starch such as a potato starch, of Wu et al., would have been well within the ordinary level of skill to have performed. Furthermore, Wu et al. add whey protein to the combination, which reads upon instant claims 57-58, and disclose the use of calcium hydroxide in the mixture.

Art Unit: 1761

Conclusion

Applicant's amendment necessitated the new ground(s) of rejection presented in this Office action. Accordingly, **THIS ACTION IS MADE FINAL**. See MPEP § 706.07(a). Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire **THREE MONTHS** from the mailing date of this action. In the event a first reply is filed within **TWO MONTHS** of the mailing date of this final action and the advisory action is not mailed until after the end of the **THREE-MONTH** shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than **SIX MONTHS** from the date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Keith Hendricks whose telephone number is (571) 272-1401. The examiner can normally be reached on M-F (8:30am-6pm); First Friday off.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Milton Cano can be reached on (571) 272-1398. The fax phone number for the organization where this application or proceeding is assigned is 703-872-9306.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).


KEITH HENDRICKS
PRIMARY EXAMINER